Costs in Public Law

Introduction

1. The following topics will be covered in this lecture:

    a. Recovery of *inter partes* costs in judicial review.

    b. Costs budgeting.

    c. Protective Costs Orders.

    d. Wasted Costs Orders and Non party costs orders.

Inter partes costs recovery

2. The well-established law for the recovery of costs where judicial review proceedings settled without a hearing until recently was as follows, per Scott Baker J in *Boxall v Waltham Forest LBC* (2001) 4 CCL Rep 258 at [22]:

> "(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs; (ii) It will ordinarily be irrelevant that the claimant is legally aided; (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost; **(iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties; (v) In the absence of a good reason to make any other order the fall back is to make no order as to costs; (vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage**." (emphasis added)

3. At [12] Scott Baker J stated as follows:

> "Quite apart from the statutory principle that legally aided litigants should not be treated differently from those who are not, the failure of a legally aided litigant to obtain a costs order against another party may have serious consequence in several respects:
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> > (1) Where legal aid is subject to a contribution by the litigant he may be out of pocket;
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> > (2) The level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs. This is said in part to reflect the risk lawyers take in backing a publicly funded case that turns out to be unsuccessful;
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> > (3) It is important for the Legal Services Commission to recoup, where it can, the cost of litigation it has funded. It has, in the end a finite budget. It needs the funds to finance other deserving cases."

4. In *Boxall* itself the Claimants, who alleged failure to assess their accommodation, community care, and welfare needs, were awarded costs, for there was little doubt that the Defendant would have been found to have acted unlawfully in some respect.

5. These guidelines pre-dated the Pre-Action Protocol for Judicial Review which was introduced in December 2001, which states:

> "8. Before making a claim, the claimant should send a letter to the defendant. The purpose of this letter is to identify the issues in dispute and establish whether litigation can be avoided …"
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> "13. Defendants should normally respond within 14 days using the standard format … Failure to do so will be taken into account by the court and sanctions may be imposed unless there are good reasons."
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> "14. Where it is not possible to reply within the proposed time limit the defendant should send an interim reply and propose a reasonable extension. Where an extension is sought, reasons should be given and, where required, additional information requested. This will not affect the time limit for making a claim for judicial review … nor will it bind the claimant where he or she considers this to be unreasonable. However, where the court considers that a subsequent claim is made prematurely it may impose sanctions."

6. In *R (Scott) v Hackney LBC* [2009] EWCA Civ 217 the *Boxall* principles were challenged; the Public Law Project intervened to make submissions on the general principles applicable in costs in public law cases.

7. Lady Justice Hallett, giving the judgment of the Court of Appeal, stated as follows:

> "38. Given Scott Baker J's summary of the essential principles to be applied in a case of this kind, about which there seems to be little if any dispute, I confess I was at a loss to understand what further guidance could be required of us. This court cannot change the law because there is said to be insufficient funds available to the public purse to fund litigation in the way that many would like. There is not yet one set of rules for cases where publicly funded claimants bring proceedings for judicial review and another set of rules for other civil litigation. However, during the course of argument it became clear that the parties were not in fact asking for a great deal of guidance from the court. They wished this court simply to reinforce the message contained in paragraph 12 of Boxall as to the effect on the legal aid system and legal aid practitioners of not making inter partes orders where appropriate. They wished us to urge judges to bear this effect very much in mind when considering applications for costs.
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> 39. Mr Cragg submits that the vast bulk of judicial review claims against local authorities settle before hearing, usually because the claimant has achieved his goal. Yet, he says, judges are reluctant to make costs orders in cases which have settled in the claimant's favour on the basis, for example, that the result was not a foregone conclusion, a public authority has changed its mind, or, in social worker cases, there is a need for good working relationship between the parties which militates towards a neutral costs position.
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> 40. Both he and Mr Clayton urged upon the court that we should endorse the more rigorous approach to making costs orders advocated we are told by, amongst others, the Bar Council. In his written submissions Mr Clayton went further. He flirted with the suggestion of inviting the court to import into Part 44.3 a presumption that an inter partes costs order should be made in a case where a compromise is reached before permission to bring judicial review is granted. However, rightly in my view, he did not pursue this in oral submissions; if for no other reason than this is not such a case.
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> 41. Mr Clayton observed, however, that, as valuable as the guidance was in Boxall, the case was decided before the pre-action protocol on judicial review came into force on 4 March 2002. **Plainly, the compliance with or breach of the pre-action protocol must be a relevant factor to be taken into account. It would fall under the heading of relevant conduct.** Mr Clayton submits that the best way to remind litigants of the importance of the pre-action protocol is by judges imposing costs penalties for significant breaches of it, as is the case elsewhere. However, the question of how to encourage compliance with the pre-action protocol in public law cases does not arise for consideration on this appeal. It is common ground this case involves a straightforward application of the Boxall principles." (emphasis added)

8. She concluded as follows:

> "50. It is not for this court to interfere and set aside a perfectly proper order because the rates of pay of publicly funded work are said to be too low. I understand the expressed concerns. It would be a sad day if society lost the services of lawyers prepared to act in publicly funded cases for the most vulnerable in society. It would also, I note, be a sad day if hard pressed local authorities found themselves unable to care for the vulnerable and needy in their areas, in the way they would wish, because they have wasted too many precious resources on unmeritorious claims.
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> 51. For my part, the furthest I would be prepared to go along the path urged upon us by Mr Cragg and Mr Clayton would be to **urge all judges to bear in mind that, when an application for costs is made, a reasonable and proportionate attempt must be made to analyse the situation and determine whether an order for costs is appropriate.** I emphasise a reasonable and proportionate attempt, bearing in mind the pressures on the Administrative Court, yet another hard pressed institution. **A judge must not be tempted too readily to adopt the fall back position of no order for costs.**" (emphasis added)

9. On the facts the Court of Appeal declined to interfere with the judge's decision to make no order for costs below, on the ground that it was far from clear cut that the Appellant would have succeeded in any of his core claims.

10. *In re appeals by Governing Body of JFS* [2009] UKSC 1 [2009] 1 WLR 2353 Lord Hope of Craighead DPSC, giving the judgment of the Supreme Court, said as follows[1]:

> "**No costs orders**
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> 24 As has already been noted, Ms Rose declined to seek an order that each side should be liable for its own costs in any event on the ground that to do so would be wrong in principle. As Scott Baker J observed in R (Boxall) v Waltham Forest London Borough Council (2000) 4 CCLR 258, para 12, the failure of a legally aided litigant to obtain a costs order against another party may have serious consequences. This is because, among other things, the level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs. This disadvantage is all the greater in a case such as this. It is a high costs case, for which lawyers representing publicly

[1] In the context of rejecting the submission that an answer to the refusal of the LSC to fund the opposition of an appeal in the Supreme Court was an order that each side should be liable for its own costs.

> funded parties are required to enter a high costs case plan with the Legal Services Commission. It is a common feature of these plans that they limit the number of hours to an artificially low level and the rates at which solicitors and counsel are paid to rates that are markedly lower than those that are usual in the public sector. Mr Reddin has indicated that, as they are defending a win, E's solicitors would not be expected to be paid at risk rates. Nevertheless the rate of remuneration that is likely to be agreed for this appeal will be considerably lower than that which would be reasonable if costs were to be determined inter partes.
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> 25 It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work. In R (Boxall) v Waltham Forest London Borough Council Scott Baker J said that the fact that the claimants were legally aided was immaterial when deciding what, if any, costs order to make between the parties in a case where they were successful and he declined to order that each side should bear its own costs. **It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded.** Had such an order been asked for in this case we would have refused to make it." (emphasis added)

11. In *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895 [2011] CP Rep 43 involved a further challenge to the *Boxall* principles, based on the introduction of the pre-action protocol after that case.

12. The Appellants had gained the relief sought (Indefinite Leave to Remain) by consent having issued claims for judicial review. The Appellants had complied with the pre-action protocol, but the Secretary of State had not. The High Court in each case had declined to make costs orders in favour of the Appellants.

13. It was submitted by the Public Law Project that Boxall principle (v) should be amended such that where there had been compliance with the pre-action protocol, a Defendant needs to show a good reason for failing to comply, if he is not to pay costs.

14. Reference was made to the representations of PLP at the judicial review seminar held by Jackson LJ in July 2009 (see paragraph 3.21 of his Final Report):

> "PLP points out that *Boxall* was decided before the protocol came into effect. PLP states that research shows that approximately 60 per cent of judicial review cases are now settled following the letter of claim. Nevertheless some authorities wait to see whether proceedings will in fact be issued and whether permission will be granted before settling. Furthermore, many judicial review claims settle following the grant of interim relief, such as interim accommodation or an order for community care assessment. Yet the effect of *Boxall* is that claimants seldom recover costs in these cases. **PLP propose that, if C has followed the protocol but D has not, there should be a presumption that D should pay C's costs. This would encourage reasonable litigation behaviour on the part of defendants.** Also it would transfer the costs burden in many cases from the legal aid fund to the defendant authorities. Similar arguments are advanced by the firms of claimant solicitors mentioned above." (emphasis added)

15. In his Final Report Jackson LJ recommended (at paragraphs 4.12 and 4.13 of Chapter 30):

> "The *Boxall* approach made eminently good sense at the time that case was decided. However, now that there is an extremely sensible protocol in place for judicial review claims, I consider the *Boxall* approach needs modification, essentially for the reasons which have been urged upon me during Phase 2.
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> … **in any judicial review case where the claimant has complied with the protocol, if the defendant settles the claim after (rather than before) issue by conceding any material part of the relief sought, then the normal order should be that the defendant pays the claimant's costs.** A rule along these lines would not prevent the court from making a different order in those cases where particular circumstances warranted a different costs order." (emphasis added)

16. Lord Justice Pill, giving the leading judgment, expressed the view that, "while the context is different, I regard Lord Hope's statement that "the consequences for solicitors who do publicly funded work are a factor which must be taken into account" is intended to be of general application." (at paragraph 49).

17. He also made the following general comments:

"59. **What is not acceptable is a state of mind in which the issues are not addressed by a defendant once an adequately formulated letter of claim is received by the defendant. In the absence of an adequate response, a claimant is entitled to proceed to institute proceedings. If the claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant. Inherent in that approach, is the need for a defendant to follow the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol, an aspect of the conduct of the parties specifically identified in CPR r.44.3(5).** The procedure is not inflexible; an extension of time may be sought, if supported by reasons.

60. Notwithstanding the heavy workload of UKBA, and the constraints upon its resources, there can be no special rule for government departments in this respect. Orders for costs, legitimately made, will of course add to the financial burden on the Agency. That cannot be a reason for depriving other parties, including publicly funded parties, of costs to which they are entitled. It may be, and it is not of course for the court to direct departmental procedures, that resources applied at an earlier stage will conserve resources overall and in the long term.

61 In the case of publicly funded parties, it is not a good reason to decline to make an order for costs against a defendant that those acting for the publicly funded claimant will obtain some remuneration even if no order for costs is made against the defendant. Moreover, **a culture in which an order that there be no order as to costs in a case involving a public body as defendant, because a costs order would only transfer funds from one public body to another is in my judgment no longer acceptable.**

62 Equally, it is not an acceptable reason to make an order for costs in favour of a claimant, and neither the appellants nor the interested parties have suggested it is, that publicly funded lawyers are, or are claimed to be, inadequately remunerated. Whether to make an order for costs depends on the merits of the particular application. However, both the warning in *Scott* against too ready resort to making no order as to costs, and the indication by Lord Hope in *JFS Governing Body*, cited at [28], in relation to publicly funded parties, demonstrate the need for analysis of the particular circumstances.

63 I have serious misgivings about UKBA's claim to avoid costs when a claim is settled for "purely pragmatic reasons". My reservations are increased by the claim, on the facts of the present cases, that the right to work was granted for pragmatic reasons. I am unimpressed by suggestions made in the present cases that permission to work was granted for reasons other than that the law required permission to work to be granted. There may be cases in which relief may be granted for reasons entirely unconnected with the claim made. Given the Secretary of State's duty to act fairly as between applicants, and the duty to apply rules and discretions fairly, a clearly expressed reason would be required in such cases. The expression "purely pragmatic" covers a multitude

> of possibilities. A clear explanation is required, and can expect to be analysed, so that the expression is not used as a device for avoiding an order for costs that ought to be made." (emphasis added)

18. Without accepting the invitation to add specific words to the *Boxall* principle, his Lordship came close to creating a presumption that if a Claimant has complied with the pre-action protocol and the Defendant has not, and relief is subsequently obtained whether by court order of by consent, the Defendant must pay the Claimant's costs:

> "65. When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol. I regard that approach as consistent with the recommendation in para.4.13 of the Jackson Report."

19. He justified the change as follows:

> "64. … [W]hat needs to be underlined is the starting point in the CPR that a successful claimant is entitled to his costs and the now recognised importance of complying with Pre-Action Protocols. These are intended to prevent litigation and facilitate and encourage parties to settle proceedings, including judicial review proceedings, if at all possible. That should be the stage at which the concessions contemplated in *Boxall* principle (vi) are normally made. It would be a distortion of the procedure for awarding costs if a defendant who has not complied with a Pre-Action Protocol can invoke *Boxall* principle (vi) in his favour when making a concession which should have been made at an earlier stage. If concessions are due, public authorities should not require the incentive contemplated by principle (vi) to make them."

20. He concluded thus, slightly ambiguously:

> "66. I do not accede to the request to tack on words to the *Boxall (2001) 4 C.C.L. Rep. 258* QBD guidelines to meet the appellants' submissions. Such a formula would carry the danger of being used mechanistically when what is required is an analysis of the circumstances of the particular case, applying the principles now stated. These include the warning in *Scott* [2009] EWCA Civ 217 that a judge should not be tempted too readily to adopt a fall back position.

> 67. The circumstances of each case do require analysis if injustice is to be avoided. Such analysis will not normally be difficult if the parties have stated their cases competently and clearly and if the statement of reasons required when a consent order granting relief is submitted to the court genuinely and accurately reflects the reason for the termination of proceedings.
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> 68. I accept that the principle of proportionality, and the workload of the courts, require that limits are placed on the degree of analysis which is appropriate but judges should not too readily be deterred. If they find obscurity, or obfuscatory conduct by the parties, that can be reflected in the order made. A willingness to investigate is likely to promote clarity in future cases."

21. Hedley J agreed with Pill LJ, with the following addition:

> "76. …[I]t is clear to me that *Boxall* is a well-established guide in the area of judicial review but like all guides it must be applied both to the particular facts of the instant case and it must take account of procedural developments like PAPs. Compliance with PAP, whilst not determinative in itself, must now be a highly relevant factor in the exercise of the judicial discretion as to costs."

22. The costs order in each case was varied to grant each Appellant their costs.

23. The tide of change did not stop there. In *R (M) v Croydon LBC* [201] EWCA Civ 595 [2012] 1 WLR 2607, the Master of the Rolls, Lord Neuberger, swept away the differences between costs rules in private and public law, with costs following the event, with compliance with the pre-action protocol no longer a prerequisite to recovery of costs.

24. The Appellant was an asylum seeker who claimed to be 12 years of age. The local authority assessed his age as being over 14. Subsequently the Supreme Court handed down judgment in *R (A) v Croydon LBC* [2009] 1 WLR 2557 requiring the court to assess age itself rather than simply review the local authority's assessment, age being a precedent fact to the exercise of a local authority's powers under s20 Children Act 1989, and permission was granted in the claim. The local authority then agreed that the Appellant had been 12, and a consent Order was filed.

25. The Master of the Rolls considered costs after a trial in ordinary civil litigation, stating that there were three relevant principles:

a. Any decision relating to costs is primarily a matter for the discretion of the trial judge.

b. The general rule in all civil litigation is that the successful party can look to the unsuccessful party for his costs: CPR 44.3(2)(a).

c. The basis upon which the successful party's lawyers are funded (privately funded/CFA/CLS/law centre/pro bono) will rarely if ever make any difference to that party's right to recover costs.

26. His Lordship then described the costs rules in civil litigation in general:

> "**Costs after settlement before trial in ordinary civil litigation**
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> 47. It is open to parties in almost any civil proceedings to compromise all their differences save costs, and to invite the court to determine how the costs should be dealt with. The court has jurisdiction in such a case to determine who is to pay costs, but it is not obliged to resolve such a free-standing dispute about costs. Accordingly, by settling all issues save costs, the parties take the risk that the court will not be prepared to make any determination other than that there be no order for costs not only because that is the right result after analysing all the arguments, but also on the ground that such an exercise would be disproportionate.
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> 48. In *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2004] FSR 150 Chadwick LJ said this at para 24 (which was *approved in Venture Finance plc v Mead* [2006] 3 Costs LR 389):
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> > "In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether-having regard to all the circumstances (including conduct) as CPR r 44.3(4) requires-the order for costs should be limited in one or more of the respects set out in CPR r 44.3(6). But where there has been no trial-or no judgment-the judge may well not be in a position to reach a decision on those matters. He will not be in a position to decide those matters if they turn on facts which have not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs. As the arguments on the present appeal demonstrate, it does the parties no service if the judge-in a

> laudable attempt to assist them to resolve their dispute-makes an order about costs which he is not really in a position to make."

49. However, Chadwick LJ immediately went on to say in the next paragraph, para 25:

> "There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule."

This would seem to me to be clearly right. **Given the normal principles applicable to costs when litigation goes to a trial, it is hard see why a claimant who, after complying with any relevant protocol and issuing proceedings, is accorded by consent all the relief he seeks, should not recover his costs from the defendant, at least in the absence of some good reason to the contrary. In particular, it seems to me that there is no ground for refusing the claimant his costs simply on the ground that he was accorded such relief by the defendants conceding it in a consent order, rather than by the court ordering it after a contested hearing.** In the words of CPR r 44.3(2) the claimant in such a case is every bit as much the successful party as he would have been if he had won after a trial.

50. **The outcome will normally be different in cases where the consent order does not involve the claimant getting all, or substantively all, the relief which he has claimed. In such cases the court will often decide to make no order for costs, unless it can without much effort decide that one of the parties has clearly won, or has won to a sufficient extent to justify some order for costs in its favour.** Thus the fact that the claimant has succeeded in obtaining part of the relief he sought may justify his recovering some of his costs, for instance where the issue on which the claimant succeeded was clearly the most important and/or expensive issue. But in many such cases the court may consider that it cannot fairly award the claimant any costs because, for instance, it is not easy to assess whether the defendants should have their costs of the issue on which the claimant did not succeed, and whether that would wipe out the costs which the claimant might recover in relation to the issue on which he won.

51. **In many cases which are settled on terms which do not accord with the relief which the claimant has sought, the court will normally be unable to decide who has won, and therefore will not make any order for costs. However, in some cases the court may be able to form a tolerably clear view without much effort. In a number of such cases the court may well be assisted by considering whether it is reasonably clear from the available material whether one party would have won if the case had proceeded to trial.** If for instance it is clear that the claimant would have won, that would lend considerable support to his argument that the terms of settlement represent success such that he should be awarded his costs. An example of such a case is *Brawley v Marczynski* [2003] 1 WLR 813 where the

court could determine without too much effort who would have won, and then took that into account when awarding costs." (emphasis added)

27. Lord Neuberger then considered whether there was any valid reason to distinguish Administrative law cases:

"**The position where cases settle in the Administrative Court**

52. The question which then arises is **whether the principles discussed in the preceding section of this judgment should apply in the Administrative Court, just as much as to other parts of the civil justice system: in particular, where the defendants accept that the claimant is entitled to all, or substantially all, the relief which he claims, should the defendants pay his costs unless they can show good reason to the contrary? At least on the face of it the fact that a claim is a public law claim should make no difference. Such claims are subject to the CPR, and a successful claimant who has brought such a claim is just as much entitled to his costs as he would be if it had been a private law claim. The court's duty to protect individuals from being wronged by the state, whether national or local government, is every bit as vital as its duty to enable them to vindicate their private law rights. And the fact that the defendants are public bodies should make no difference**, as Pill LJ explained in the *Bahta case* [2011] 5 Costs LR 857, para 60. However, a number of points could be raised as to why defendants who concede claims in the Administrative Court should be less at risk on costs than those who concede in ordinary civil actions.

53. First, it may be said that government and public bodies should be encouraged to settle, and should not therefore be penalised in costs if they do so after proceedings have been issued. There are four answers to that. First, **if it is a good point it should apply to any litigation, whether in private law or public law, and in very few if any private law cases would such an argument carry any weight. The implication that public authority defendants should be in a more privileged position than other defendants in this connection is not, in my view, maintainable.** Secondly, it is simply unfair on the claimant or his lawyers if, at least in the absence of special factors, he does not recover his costs of bringing wholly successful proceedings, provided that they have been properly brought and conducted. Thirdly, while defendants may be more ready to concede a claim rather than fight it if they know that they will not thereby be liable for the claimant's costs, **it can forcefully be said that the fact that, if defendants know they will have to pay the claimant's costs, it would be a powerful incentive to concede the claim sooner rather than later.** Fourthly, if the defendants wish to settle, the time to do so is before proceedings are issued: that is one of the main reasons for the introduction of the Protocol.

54. Secondly, it may be said that because of the three-month time limit there will often be less time available for defendants in a public law claim to consider the merits of the claimant's case than in a private law claim, where the more generous time limits in the Limitation normally apply. In my

opinion, in some cases that factor might justify making a more generous order for costs from the defendants' perspective than the analysis in the previous section of this judgment might otherwise suggest. It would not be good enough for defendants to say that they had not got round to dealing with the claimant's claim because of their "heavy workload" or "constraints upon [their] resources" (see the *Bahta* case, para 60). However, where the claim is one which reasonably requires more time to investigate than is available before the three-month period runs out, there may be a powerful case for defendants who thereafter concede the claim not being liable for any or some of the claimant's costs. However, that does not seem to me to give rise to a difference in principle between Administrative Court litigation and other civil litigation-for instance, where the letter before action is written very shortly before the expiry of the limitation period.

55. A third argument is that defendants sometimes concede claims in the Administrative Court simply because it is not worth the candle fighting the case, or because the claim is justified only on a relatively technical ground such as a procedural defect. In the first type of case it is said to be unfair to penalise the defendants in costs for taking a view which, while not necessarily reflecting the legal merits, is realistic and proportionate. In the second type of case the court normally then remits the decision to the defendants, who then go on to reconsider and often arrive at the same substantive conclusion as before. In the main it seems to me that the answer to this is that the defendants should make up their mind to concede the claim for such reasons before proceedings are issued. That is one of the main purposes of the Protocol, and if defendants delay considering whether they should concede a claim, that should not be a reason for depriving the claimant of his costs. If in fact the only reason the defendants did not take that course was that they had insufficient time to consider the claimant's claim, one is back to the point discussed in the preceding paragraph. In some cases Pill LJ's scepticism about this argument, as expressed at para 63 of the *Bahta* case, will apply; in others the defendants may be short of resources but, as mentioned, that is not a good reason for depriving the claimant of his costs.

56. A fourth argument is that in some public law cases the law (or what is understood to be the law) changes after the issue of proceedings, so that what appears to be a weak claim becomes transformed into a strong claim. An obvious example is where the Supreme Court overrules previous Court of Appeal authority, so that the defendants who (justifiably) thought they had a very strong case suddenly realise that they are very much on the back foot. In the *Bahta case* [2011] 5 Costs LR 857 Pill LJ was unimpressed with the UKBA's argument that they were entitled to refuse to agree the claimants' cases on the ground that, although Court of Appeal authority was against the UKBA, they were entitled to act on the assumption that the Supreme Court might take a different view, which in the event they did not. By parity of reasoning, it may seem rather harsh to visit defendants with liability for all the claimant's costs, because they assumed that the law was as the Court of Appeal had decided, until the Supreme Court took a different view. In such a case, however, while the defendants have a real argument for saying that they should not pay all the claimant's costs, the claimant can none the less raise all

the normal reasons for receiving his costs. This argument would apply equally to ordinary civil cases.

57. A fifth argument, which also applies to ordinary civil cases, is based on a number of miscellaneous possible factual situations which arise in Administrative Court cases. They involve various failings on the part of the claimant, such as not having set out his case clearly in his letter before action, adding to his evidence well after the issue of proceedings, including a claim which does not succeed, or pursuing the claim in an unreasonable manner. In cases where such an argument is raised by the defendants, the court may well be persuaded either that it would be wrong to award the claimant any costs for the reasons canvassed by Chadwick LJ in the BCT Software Solutions case [2004] FSR 150, para 24, or that the claimant should only receive a proportion of his costs. As in any civil litigation, a claimant who succeeds is only entitled to his costs in the absence of good reason to the contrary. Thus where the claim has been conceded in a consent order which does not deal with costs, the court will not award the claimant all or any of his costs save to the extent that it is satisfied, without looking at matters in detail, that the claimant is so entitled." (emphasis added)

28. Critically, his conclusion was that "the position should be no different for litigation in the Administrative Court from what it is in general civil litigation" (paragraph 58).[2]

29. Lord Neuberger divided cases into three categories:

[2] The judge opined that this view did not involve any inconsistency with the *Boxall* principles:

"58. Accordingly, I conclude that the position should be no different for litigation in the Administrative Court from what it is in general civil litigation. In that connection, at any rate at first sight, there may appear to be a degree of tension between this conclusion, which applies the "general rule" in CPR r 44.3(2)(a) , and the fifth guideline in the *Boxall* case 4 CCLR 258 , at least in a case where the settlement involves the defendants effectively conceding that the claimant is entitled to the relief which he seeks. In such a case the claimant is almost always the successful party, and should therefore, at least prima facie, be entitled to his costs, whereas the fifth guideline seems to suggest that the default position is that there should be no order for costs. Similarly, there could be said to be a degree of tension between what was said in paras 63 –65, and the view expressed in para 66 of the *Bahta* case [2011] 5 Costs LR 857.

59. In my view, however, on closer analysis there is no inconsistency in either case, essentially for reasons already discussed. Where, as happened in the Bahta case, a claimant obtains all the relief which he seeks, whether by consent or after a contested hearing, he is undoubtedly the successful party who is entitled to all his costs, unless there is a good reason to the contrary. However, where the claimant obtains only some of the relief which he is seeking (either by consent or after a contested trial), as in the *Boxall* case and the *Scott* case [2009] EWCA Civ 217, the position on costs is obviously more nuanced. Thus as in those two cases there may be an argument as to which party was more "successful" (in the light of the relief which was sought and not obtained) or, even if the claimant is accepted to be the successful party, there may be an argument as to the importance of the issue, or costs relating to the issue, on which he failed."

a. Claimant wholly successful after a contested hearing or pursuant to a settlement.

b. Claimant only partly successful after a contested hearing or pursuant to a settlement.

c. Compromise which does not actually reflect the Claimant's claims.

30. The proper approach for each cases was as follows:

a. Absent special circumstances the Claimant should recover all his costs.

b. It depends on the facts.[3]

c. The court will often be unable to guage whether there is an unsuccessful party, and there is an even more powerful argument that the default position should be no order for costs.

31. In *AL (Albania) v Secretary of State for the Home Department* [2012] EWCA Civ 710 [2012] 1 WLR 2898 the question arose whether the same principles applied for statutory appeals from the Upper Tribunal to the Court of Appeal (the particular tribunal being the Upper Tribunal (Immigration and Asylum Chamber).

32. It was argued that the context of a statutory appeal is different from a claim for judicial review: there is no pre-action protocol, and the respondent is not necessarily

[3] Lord Neuberger stated at [62]: "…when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases the court will be able to form a view as to the appropriate costs order based on such issues; in other cases it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in the *Scott case* [2009] EWCA Civ 217. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases it may help to consider who would have won if the matter had proceeded to trial as, if it is tolerably clear, it may for instance support or undermine the contention that one of the two claims was stronger than the other. The *Boxall* case 4 CCLR 258 appears to have been such case."

an active participant prior to the grant of permission, unlike in the Administrative court (in which an Acknowledgment of Service is required).

33. The court rejected the concept that there should be a context-specific exception from CPR 44 for statutory appeals; what matters is the identification of the successful party.

34. There have been a number of further decisions illustrating the application of the principles in *R (M) v Croydon*:

a. A Claimant's failure to comply with the pre-action protocol in a challenge to the certification of an Article 8 claim in an immigration context which was robustly defended, where the Secretary of State subsequently conceded that the Claimant was entitled to an in-country appeal on her Article 8 claim, was causally insignificant, and the Claimant was awarded her costs: *R (KR) v Secretary of State for the Home Department* [2012] EWCA Civ 1555.

b. A claim challenged a refusal to provide accommodation and support under *s21 National Assistance Act 1948* on the basis that the Claimants were infirm rather than able-bodied destitute. However the claim became academic after the Secretary of State granted ELR. A judge had been entitled to conclude that it was uncertain who would have won at trial and was entitled to make no order for costs: *R (Naureen) v Salford City Council* [2012] EWCA Civ 1795 (2013) 16 CCL Rep 21.

c. Where the Secretary of State's concession granting the relief sought, but where that decision was based on new information in relation to the transfer of detainees to Afghan custody (re-imposing a moratorium on transfer of detainees to the custody of the NDS in Afghanistan), that was a good reason to justify a departure from the general rule as to costs: *R (Mohammed) v Secretary of State for Defence* [2012] EWHC 3946 (Admin).

d. Where an accountant had brought an arguably premature judicial review claim against the Institute of Chartered Accountants seeking the dismissal of a

complaint before it had been considered by the Investigation Committee, the court made no order for costs, as the Defendant had arguably brought the claim on itself having behaved unfairly towards the Claimant, such that neither side could be said to have won: *R (Crookenden) v Institute of Chartered Accountants* [2013] EWHC 1909 (Admin).

e. Although a company had been entitled to maintain parallel statutory appeal and judicial review proceedings seeking the quashing of the Secretary of State's decision to remove its recognition as a producer organisation, it was not entitled to its costs of the judicial review proceedings where they had been discontinued by consent in light of its success in the statutory appeal, since it could not be said that it would have won the judicial review claim which did not overlap with the appeal (ie abuse of process): *Speciality Produce Ltd v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 2196 (Ch).

f. Although a solicitor's firm had been partly successful in a judicial review challenging a Deputy Distrct Judge's decision about the enforceability of a solicitor's retainer, having succeeded in having the matter to the SCCO, but the case had been conducted with a lack of economy, the abandonment of points raised earlier, and its failure to raise the right point at the right time, the judge was entitled to make no order for costs: *R (Srinivasans Solicitors) v Croydon County Court* [2013] EWCA Civ 249.

g. A Claimant with complex physical and nursing needs was in an NHS placement funded by the local PCT. The Trust considered that C no longer had primary healthcare needs and proposed to discontinue funding the placement. C's solicitors asked for C's assessment and care plan, but these were not forthcoming. C issued judicial review proceedings, but then was offered accommodation and a care package, which was acceptable, and proceedings were discontinued. Where it had been reasonable to issue judicial review proceedings and in substance a Claimant had achieved what she set out to achieve in the proceedings it was wrong to make no order for costs: *R (Dempsey) v Sutton LBC* [2013] EWCA Civ 863.

h. An asylum seeker challenging a local authority's age assessment had waited six months before accepting an offer made after permission had been granted that was materially the same as the relief sought in the judicial review claim (a fresh assessment), yet he pursued the claim further before settling. He only obtained his costs up to the date of the offer: *R (TH) v East Sussex CC* [2013] EWCA Civ 1027.

Costs Budgeting

35. This is a central plank of the new reforms, aimed at keeping close control over costs as a case proceeds, rather than assessing it retrospectively at detailed assessment proceedings. It is contained in CPR 3.12 – 3.18, and Practice Direction 3E.

36. It does not presumptively apply to judicial review proceedings,[4] but parties may request the court to order otherwise. It is a useful tool in a Claimant's litigation armoury, but requires some care.

37. It contains four essential elements:

    a. The parties exchange litigation budgets.

    b. The court states the extent to which those budgets are approved.

    c. So far as possible, the court manages the case so that it proceeds within the approved budgets.

    d. At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget.

38. It represents a significant change. It is a fundamental principle of civil costs law that costs are assessed *ex post facto*; what matters is whether items of work were reasonable/necessary <u>at the time</u> – not judged with the benefit of hindsight. *In Francis v Francis and Dickerson* [1956] P. 87 Sachs J stated the following:

[4] Because there is no procedural step in which a court officer provisionally allocates the case to a track, under CPR 26.3(1).

> "When considering whether or not an item in a bill of costs is "proper" the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client. That is, of course, a very different angle to that called to mind by the registrar's observation; it is wrong for a taxing officer to adopt an attitude akin to a revenue official called upon to apply rigorously one of those Income Tax Act Rules as to expenses which have been judicially described as "jealously restricted" and "notoriously rigid and narrow in their operation.""

The Registrar had said the following:

> "To quote a former senior registrar, it is the duty of solicitors 'to do all they properly can to protect the fund and thereby the interests of the taxpayer,' a duty which respondent's solicitors have failed to discharge. They have also gone beyond what was absolutely necessary in the interests of their client.

39. It is unclear how rigorously deviations from costs budgets will be treated by the courts. CPR 3.18 states as follows:

> "**CPR 3.18.— Assessing costs on the standard basis where a costs management order has been made**
>
> In any case where a costs management order has been made, **when assessing costs on the standard basis, the court will—**
> **(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and**
> **(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so**." (emphasis added)

40. The issue of what was a good reason to depart from an approved costs budget arose in *Henry v News Group Newspapers* [2013] EWCA Civ 19 [2013] 2 All ER 840. The claim was for defamation, and was settled. The Defendant objected to the Claimant's bill of costs on the basis that it exceeded the approved budget. It was held that there was a good reason to depart from the budget on the facts. As to the general principles:

> "16. … **It is implicit in para 5.6 of the practice direction that the approved costs budget is intended to provide the framework for a detailed assessment and that the court should not normally allow costs in an amount which exceeds what has been budgeted for in each**

section. That makes good sense if the proper procedure has been followed and the costs have been managed in a way that ensures that they are restricted to an amount that keeps the parties on an equal footing and is proportionate to what is at stake in the proceedings. However, para 5.6 expressly recognises that there may be good reasons for departing from the budget and allowing a greater sum. On the other hand, costs budgeting is not intended to derogate from the principle that the court will allow only such costs as have been reasonably incurred and are proportionate to what is at stake; it is intended to identify the amount within which the proceedings should be capable of being conducted and within which the parties must strive to remain. Thus, if the costs incurred in respect of any stage fall short of the budget, to award no more than has been incurred does not involve a departure from the budget; it simply means that the budget was more generous than was necessary. Budgets are intended to provide a form of control rather than a licence to conduct litigation in an unnecessarily expensive way. Equally, however, it may turn out for one reason or another that the proper conduct of the proceedings is more expensive than originally expected.

17. It follows that when considering whether there is good reason to depart from the approved budget it is necessary to take into account all the circumstances of the case, but with particular regard to the objective of the costs budgeting regime. In the case of the present scheme the objective is set out in para 1.3 of the practice direction, namely, to manage the litigation so that the costs of each party are proportionate to what is at stake and to ensure that the parties are on an equal footing. The emphasis in para 1.3 is on the court's management of the proceedings and thereby of the costs, a requirement reflected in para 2(1), which for these purposes adds a new paragraph to CPR PD 29 requiring the court to manage the costs of the litigation as well as the case itself, and para 5.1. These paragraphs make it clear that, just as the court has responsibility for managing the proceedings, so also it has a responsibility for managing the costs and that it is expected to manage the costs by managing the proceedings in a way that will keep them within the bounds of what is proportionate.

18**. I do not think that it would be wise to attempt an exhaustive definition of the circumstances in which there may be good reason for departing from the approved budget.** The words themselves are very broad and experience teaches that any attempt by an appellate court to provide assistance in a matter of this kind risks creating a set of rigid rules **where flexibility was intended**. Circumstances are infinitely variable and it is vital that judges exercise their own judgment in each case. Having said that, **the starting point must be that the approved budget is intended to provide the financial limits within which the proceedings are to be conducted and that the court will not allow costs in excess of the budget unless something unusual has occurred. Whether there is good reason to depart from the approved budget in any given case, therefore, is likely to depend on, among other things, how the proceedings have been managed, whether they have developed in a way that was not foreseen when the relevant case management orders were made, whether the costs incurred are proportionate to what is in**

issue and whether the parties have been on an equal footing." (emphasis added)

41. However Henry was a pre 1 April 2013 case; and the Jackson reforms were predicated on the courts being stricter with parties in relation to procedural defaults.

42. In a recent case under the transitional rules (not the new rules), *Andrew Mitchell MP v News Group Newspapers* [2013] EWHC 2355 (QB), it was common ground that the Claimant had failed to file a costs budget not less than seven days before the date of a costs budgeting hearing. Nor had the Claimant engaged in any discussion of costs budgets until an email from the Master the day before the hearing. The Master initially held that, subject to an application for relief against sanction, the Claimant's budget would be limited to the court fees: [2013] EWHC 2179 (QB). Subsequently she refused the Claimant's application for relief against sanction: [2013] EWHC 2355 (QB).

43. Her reasons were as follows:

"53. **The explanations put forward by the Claimant's solicitors are not unusual ones. Pressure of work, a small firm, unexpected delays with counsel and so on. These things happen, and I have no doubt they happened here. However even before the advent of the new rules the failure of solicitors was generally not treated as in itself a good excuse and I am afraid that however much I sympathise with the Claimant's solicitors, such explanations carry even less weight in the post *Jackson* environment.**

…

56. There is no evidence before me of particular prejudice to Mr Mitchell arising from my order: it would be for him to demonstrate that and it would be wrong of me to make assumptions about the wording of his CFA agreement with his solicitors which may or may not mean that my sanction affects him financially or in terms of legal representation. **Even if it did affect him financially and as to representation, there are many claimants who manage without lawyers and it could not be said that he would be denied access to a court more than is the case for others if they have to represent themselves.** Art 6 rights are engaged but a proportionate sanction can be a legitimate interference with Art 6 and in this instance Mr Mitchell is not driven from the court.

…

58. This is a claim about reputation and about freedom of the press to report news stories. It is important to Mr Mitchell and it is important to the Defendants too. **Cases are usually important to the parties but if such considerations weighed too heavily one would be unable to implement the objectives of the new rules.** One would be unable to prevent some claims from taking unfair amounts of judicial resources away from other claims at the very moment when it is common knowledge that budgetary constraints may lead to fewer judges in the courts, and to reduced non-judicial resources to operate those courts.

59. Judicial time is thinly spread, and the emphasis must, if I understand the *Jackson* reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all. Per the Master of the Rolls in the 18th Lecture quoted above:

> "*The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now."*

60. I have given close consideration to the amount of time which the Claimant had to produce his budget. Was there procedural unfairness? On the face of it 4 days is short and even shorter when one considers that two days were weekend days. But having considered this carefully, because it was a point which troubled me, the view I have taken is that the parties were well aware that this was a case for which budgeting would be required from the start and that the mere fact that a date is set for a CMC is not supposed to be the starting gun for proper consideration of budgeting.

61. **Budgeting is something which all solicitors by now ought to know is intended to be integral to the process from the start, and it ought not to be especially onerous to prepare a final budget for a CMC even at relatively short notice if proper planning has been done.** The very fact that the Defendants, using cost lawyers, were well able to deal with this in the time allotted highlights that there is no question of the time being plainly too short or unfairly so.

62. I have also given close consideration as to the stated objective of PD 51D and notably the concept of equality of arms referred to there but my conclusion is that the objective stated there relates to decisions made as part of cost budgeting, rather than sanctions for failure to engage with the process at all. **Moreover the new overriding objective and the identical wording in rule 3.9 highlight the emphasis to be placed, now, on rule compliance and one has to give effect to that**." (emphasis added)

44. The case is due to be heard in the Court of Appeal shortly – watch this space.

Protective Costs Orders

45. A Claimant may wish to apply for an order that it pays not costs even if it loses the case. In *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347 Dyson J accepted that he had the power to make such an order – now known as a Protective Costs Order ("PCO"). However Dyson J indicated that only in the most exceptional circumstances would the discretion to make a PCO be exercised in a public law case. The criteria were stated at p358:

a. The court is satisfied that the issues raised are truly ones of general public importance; and

b. That it has a sufficient appreciation of the merits of the claim (by short argument) that it can conclude that it is in the public interest to make the order.

c. The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue.

d. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

46. In *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 the Court of Appeal reviewed the jurisdiction and procedure of PCOs. The case involved an application for judicial review of procedures adopted by the Export Credit Guarantee Department of the DTI. Corner House was a non-profitmaking company with a particular interest and expertise in examining bribery and corruption in international trade.

47. The general principles were recast as follows:

> "1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> **i) The issues raised are of general public importance;**

ii) The public interest requires that those issues should be resolved;

iii) The applicant has no private interest in the outcome of the case;

iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;

v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above." (emphasis added) [74]

48. The second guideline in the CPAG case was modified,

> "no PCO should be granted unless the judge considers that the application for judicial review has **a real prospect of success**…" [73] (emphasis added)

49. The court commented that

> "Dyson J's requirement that the court should have a sufficient appreciation of the merits of the claim after hearing short argument tends to preclude the making of a PCO in a case of any complexity." [71]

50. A PCO which prescribed that there be no order as to costs whatever the outcome would generally only be granted where the Claimant's lawyers were acting pro bono.

51. Where the Claimant is expecting to have its reasonable costs reimbursed in full if it won, a costs capping order was more likely to be required.

52. As to the amount of the cap:

a. the court should prescribe by way of a capping order a total amount of the recoverable costs inclusive, so far as a CFA-funded party is concerned, of any additional liability;

b. The liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.

c. The overriding purpose is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act *pro bono*) accordingly. [76]

53. As to procedure, a PCO should be sought on the face of the initiating Claim Form, supported by the requisite evidence, which should include a schedule of the Claimant's future costs of and incidental to the full judicial review application.

54. If the Defendant wishes to resist the PCO, it should set out its reasons in the Acknowledgment of Service.

55. The application will then be considered by the judge on the papers. If the judge refuses to grant a PCO and the Claimant requests that the decision is reconsidered at a hearing, the hearing should be limited to one hour.

56. In *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 [2009] 1 WLR 1436, a challenge to the closure of the minor injuries unit at a hospital, the Court of Appeal held that there was no additional criterion that a case be exceptional. The court also held that issues of general public importance could include issues of public importance affecting only a section of the population – there was no need that the issue be of interest to all of the public nationally.

57. In *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 [2009] CP Rep 8 the Defendant's decision to grant planning permission in respect of a development was challenged. The court held:

a. There was no difference in principle to PCOs in environmental and non-environmental cases.

b. Where a court was making a PCO in favour of a Claimant, it might also be appropriate to cap the liability of the Defendant should the Claimant win.

c. There should be no automatic assumption that the Claimant's and Defendant's costs should be capped at the same amount: the amount of any cap depended on the circumstances.

d. A similar procedure to that at first instance should apply in the Court of Appeal. Issues of permission to appeal and PCOs should be considered at the same time, and the success fee (if the Claimant's lawyers are on CFAs) should be disclosed at the same time.

58. However the Court of Appeal has been forced to modify the *Corner House* approach in environmental cases engaging the Aarhus Convention, via the EIA and IPPC Directives. The Aarhus Convention requires procedures to be put in place by which the legality of decisions can be challenged in a fair, equitable, timely and not prohibitively expensive manner.

59. In *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006 [2011] 3 All ER 418 it was held that requirement 1 was inapplicable, and the court also took a liberal approach to requirements 4 and 5. Lord Justice Sullivan stated as follows:

> "39. I accept the appellant's submission that **in an art 10a case there is no justification for the application of the issues of 'general public importance' / 'public interest requiring resolution of those issues' in the *Corner House* conditions.** Both Aarhus and the Directive are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases (those cases that are covered by the EIA and IPPC Directives); and an important component of that public participation is that the public should be able to ensure, through an effective review procedure that is not prohibitively expensive, that such important environmental decisions are lawfully taken. In

summary, under EU law it is a matter of general public importance that those environmental decisions subject to the Directive are taken in a lawful manner, and, if there is an issue as to that, the general public interest does require that that issue be resolved in an effective review process. The *Corner House* principles are judge-made law and in accordance with the *Marleasing* principle (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135) those judge-made rules for PCOs must be interpreted and applied in such a way as to secure conformity with the Directive." (emphasis added)

60. He went on to comment on the proper interpretation of the "not prohibitively expensive" requirement under Article 10a:

> "46. Whether or not the proper approach to the 'not prohibitively expensive requirement under art 10a' should be a wholly objective one, I am satisfied that **a purely *subjective* approach, as was applied by Nicol J, is not consistent with the objectives underlying the Directive.** Even if it is either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the Directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of 'the public concerned'." (emphasis added)

61. In *R (Edwards) v Environment Agency (No. 2)* [2010] UKSC 57 [2011] 1 WLR 79, a challenge to a decision to approve the operation of a cement works, the Supreme Court held that it was unclear what the correct test for determining whether proceedings were "prohibitively expensive" within the meaning of the Directive, and that issues was referred to the European Court of Justice for a preliminary ruling.

62. In *R (Edwards) v Environment Agency* (Case C-260/11) [2013] 1 WLR 2914 the European Court of Justice held that the assessment of what is "not prohibitively expensive" was not a matter for national law alone. The court further held:

> "46. It must therefore be held that, where the national court is required to determine, in the context referred to in para 41 of the present judgment, whether judicial proceedings on environmental matters are prohibitively expensive for a claimant, **it cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of**

success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

47. By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

48. Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first instance proceedings, an appeal or a second appeal." (emphasis added)

63. New CPR rules have been in force since 1 April 2013 in relation to Aarhus Convention claims: see CPR 45.41 – 45.44, and PD 45 paragraphs 5.1 and 5.2.

64. An Aarhus Convention claim is defined as "a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

65. The assertion must be made in the Claim Form, and if accepted the Claimant may not be ordered to pay costs exceeding £5,000 (where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person) and £10,000 in all other cases.

66. Where a Defendant is ordered to pay costs, the costs limit is £35,000.

Wasted Costs Orders and Non Party Costs Orders

67. Both are possible in judicial review cases; they are not restricted to private law cases.

68. The power to award wasted costs against legal representatives personally is contained in what was CPR 44.14[5] if their conduct before or during the relevant proceedings was "unreasonable" or "improper".

69. In *R (Gassama) v Secretary of State for the Home Department* [2012] EWHC 3049 (Admin) Mr. Justice Haddon-Cave made a wasted costs order on the indemnity basis in an immigration case where they had disregarded case management directions, failed to respond to correspondence, and permitted a substantive judicial review hearing to proceed without responding to the Secretary of State's Detailed Grounds or filing a Skeleton Argument, or even appearing at the hearing.

70. In *R (Grimshaw) v Southwark LBC* (Leggatt J, 17 July 2013) a wasted costs order on the indemnity basis was made against solicitors who had failed to inform the court until two days before a substantive hearing that its client had obtained the relief sought in judicial review proceedings (a dispute over the provision of temporary accommodation), and had persisted with a spurious claim for damages despite its legal aid duties in respect of public funds.

71. The jurisdiction to make a Non Party Costs Order is a matter of discretion for the court: s51 Senior Courts Act 1981.

72. In *Symphony Group Plc v Hodgson* [1994] 1 QB 179 NPCOs were divided into the following categories by Balcombe LJ (at [191G – 192E]):

    (1) Where a person has some management of the action (ie controllers) eg the director of an insolvent company who causes the company improperly to prosecute or defend proceedings. It was noted that, while it was not suggested in any of the cases cited that it would never be appropriate to order the director to pay costs, in none of them was the director so ordered.

[5] It is now CPR 44.11(1) (b).

(2) Where a person has maintained or financed the action (funders).

(3) Solicitors (legal representatives).

(4) Where the person has caused the action (causative persons) eg where D's negligence had caused P to suffer brain damage, causing a personality change which precipitated a divorce. The CA held that D's agreement to pay the costs of the divorce proceedings could be justified.

(5) Where the person is a party to a closely related action which has been heard at the same time but not consolidated (related persons).

(6) Group litigation, where one or two actions are selected as test actions.

73. Balcombe LJ accepted that these categories were neither rigid nor closed, but indicated the sorts of connection which had so far led the courts to entertain a claim for costs against a non party (at 192E).

74. He went on to give guidance for first instance judges as follows (at 192H – 194D):

a. An order for the payment of costs by a non-party will always be exceptional. The judge should treat any application for such an order with considerable caution.

b. It will be even more exceptional for a NPCO where the applicant has a cause of action against the non party and could have joined him as a party to the original proceedings.

c. The applicant should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. The last two principles are an obvious application of the basic principles of natural justice.

d. An application for payment of costs by a non-party should normally be determined by the trial judge.

e. The fact that the trial judge may in the course of his judgment have expressed views on the conduct of the non party constitutes neither bias nor the appearance of bias.

f. The procedure for the determination of costs is a summary procedure[6], not necessarily subject to all the rules that would apply in an action. For instance it may well be appropriate for judicial findings being admissible as evidence of the facts upon which they were based in proceedings between one of the parties to proceedings and a stranger (the non party).

75. The judge should be alert to the possibility that an application against a non-party is motivated by a resentment of an inability to obtain an effective costs order against a legally aided litigant.[7] The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, but the Regulations lay down conditions designed to ensure that there is no abuse of legal aid, and the court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the Regulations. This principle extends to a reluctance to infer that any maintenance by a non party has occurred.

76. In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39 [2004] 1 WLR 2807 Lord Brown summarised the principles governing the exercise of discretion as follows (at [25]):

a. Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and for their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that

[6] See also *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905 [2009] PNLR 3 at [6]; [10] – [13], and [78], making a similar point in the context of wasted costs orders.
[7] Or, it might be added, against any other litigant who cannot satisfy a costs order.

this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

b. Generally speaking the discretion will not be exercised against "pure funders" i.e. those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course. In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

c. Where the non-party not merely funds the proceedings but substantially controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party", or… "a real party…" to the litigation.

77. A NPCO should not be made when the relevant costs would have been incurred anyway without the involvement of the non-party: *Dymocks* at [18] – [20].

78. In *Flatman v Germany* [2013] EWCA Civ 278 the Court of Appeal described the position post-*Dymocks* as follows (at [26] – [28]):

> "26. In the *Knight* case, the High Court of Australia dealt with the issue in this way (per Mason CJ and Deane J at page 192):
>
> > "For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. The category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or

> some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

27. Applying these observations to the position of a solicitor, in *Myatt v National Coal Board (No 2)* [2007] 1 WLR 1559, Dyson LJ explained the current position at [8]-[9]:

> "In my judgment, the third category described by Rose LJ in the *Tolstoy-Miloslavsky* case should be understood as including a solicitor who, to use the words of Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*, is 'a real party … in very important and critical respects' and who 'not merely funds the proceedings but substantially also controls or at any rate is to benefit from them'. I do not accept that the mere fact that a solicitor is on the record prosecuting proceedings for his or her client is fatal to an application by the successful opposing party, under s.51(1) and (3) of [the Senior Courts Act 1981], that the solicitor should pay some or all of the costs. Suppose that the claimants had no financial interest in the outcome of the appeal at all because the solicitors had assumed liability for all the disbursements with no right of recourse against the clients. In that event, the only party with an interest in the appeal would be the solicitors. In my judgment, they would undoubtedly be acting outside the role of solicitor, to use the language of Rose LJ."

28. Thus, as Eady J put it, if a funder is "a real party" in the sense that he has an interest in the outcome of the litigation it may not matter that it would be inappropriate to describe that funder as "the real party". Eady J went on:

> "It may suffice, depending upon the circumstances, that the funder has something to gain alongside the nominal party. In the case of a solicitor, for example, it is not necessary to demonstrate that in the event of the litigation leading to a successful outcome he would be the sole beneficiary. Even though his client may recover compensation for himself, the solicitor could still be regarded as benefiting, or potentially benefiting, from the case to the extent that a costs order should be made against him."”

79. In *Myatt v National Coal Board (No. 2)* [2007] EWCA Civ 307 [2007] 1 WLR 1559 the Court of Appeal had dismissed the Claimants’ appeals against the finding that the conditional fee agreements were unenforceable. The issue was whether there was

jurisdiction to make an order that the Claimants' solicitors, Ollerenshaws, pay some or all of the Defendant's costs.

80. Dyson LJ held that the mere fact that a solicitor is on the record prosecuting proceedings for his or her client was not fatal to an application for a NPCO: *Myatt* at [8]. An NPCO was made in the case because the main reason why the appeal was launched was to protect the solicitor's claim to their profit costs of £200,000 in all 60 cases: [12]. The decision was expressly limited to cases where the litigation was funded by a CFA and where the issue was as to the enforceability of the CFA: [23].

81. If a solicitor funds disbursements as the case proceeds, does that render a NPCO likely if the claim fails? In *Flatman v Germany* [2013] EWCA Civ 278 [2013] 1 WLR 2676 the Court of Appeal answered in the negative (at [45] – [46]):

> "45. In my judgment, therefore, the legislation does visualise the possibility that a solicitor might fund disbursements and, in that event, it would not be right to conclude that such a solicitor was 'the real party' or even 'a real party' to the litigation. As for the policy imperative argued by Mr Brown, after the event insurance is not a pre-requisite of bringing a claim on a CFA (see *King v Telegraph Group* [2005] 1 WLR 2282 at paragraph 100 and *Floods of Queensferry Ltd v Shand Construction Ltd (supra)* at paragraph 37). The fact that a litigant can (or cannot) afford an expert report or the court fee says nothing about his or her ability to fund the costs incurred by opponents in an unsuccessful claim and, indeed, Eady J (at paragraph 25 of his judgment) recognised that the solicitor could advance disbursements with a technical (albeit improbable) obligation for repayment.
>
> 46. That much is also clear from the fact that solicitors are entitled to act on a normal fee or conditional fee for an impecunious client whom they know or suspect will not be able to pay own (or other side's costs) if unsuccessful (see *Sibthorpe v Southwark BL* [2011] 1 WLR 2111 at paragraph 50; *Awwad v Geraghty* [2001] QB 570 at 588; *Dophin Quays Developments Ltd v Mills* [2008] 1 WLR 1829 at paragraph 75."

82. In *Heron v TNT and Mackrell Turner Garrett* [2013] EWCA Civ 469 [2013] 3 All ER 479 the Court of Appeal held that failure to obtain ATE alone was not sufficient to justify a NPCO.

83. The case started out as a claim that the solicitors firm had negligently failed to obtain ATE and had then influenced the litigation so as to conceal their negligence from their client, in going to extreme lengths to avoid paying the other side's costs, even though it should have been clear that C would not beat D's offers at trial.

84. Leveson LJ stated as follows:

> "31. There is no doubt that a non-party costs order can be made against legal representatives but that, in every case, such an order is exceptional…
>
> 36. **Based on the facts as found by the judge and with which I would not interfere, the application has to be put on the basis that the failure by MTG to obtain ATE insurance (and the subsequent failure to admit that fact to Mr Heron) is itself sufficient not only to give rise to a breach of duty to him but, in addition, to demonstrate that MTG had become a 'real party' to the litigation, the person 'with the principal interest' in its outcome, or that it was acting 'primarily for his own sake'. If that was so, as I have said, every act of negligence by a solicitor in the conduct of litigation (thereby giving rise to a conflict) which means that an opposing party incurs costs which might not otherwise have been incurred would be sufficient. When pressed by Beatson LJ during the course of argument, Mr Bacon was unable to identify a principled way of drawing the line so as to avoid this consequence.**
>
> **37. I do not accept that the law goes anything like that far.** A solicitor is entitled to act on a CFA for an impecunious client who they know or suspect will not be able to pay own (or other side's costs) if unsuccessful (see *Sibthorpe v Southwark BL* [2011] 1 WLR 2111 at para. 50; *Awwad v Geraghty* [2001] QB 570 at 588; *Dolphin Key v Mills* [2008] 1 WLR 1829 at para. 75). As far as the other side is concerned, whether the solicitor has negligently failed to obtain ATE insurance to protect his client (as opposed to not being able to obtain such insurance) does not impact on the costs they will incur unless it is demonstrably provable that the costs would not have been incurred (as in *Adris*). That is not the case here." (emphasis added)

13 October, 2013

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